IN THE

Supreme Court of the United States

October Term, 1962.

No. 229.

FEDERICO MARIN GUTIERREZ,
Petitioner,

v.

WATERMAN STEAMSHIP CORP.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit.

MOTION AND BRIEF OF AMICI CURIAE, ELLERMAN & BUCKNALL STEAMSHIP COMPANY, LTD. AND CALMAR STEAMSHIP CORPORATION, IN SUPPORT OF RESPONDENT.

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MOTION OF ELLERMAN & BUCKNALL STEAMSHIP COMPANY, LTD. AND CALMAR STEAMSHIP CORPORATION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Ellerman & Bucknall Steamship Company, Ltd. and Calmar Steamship Corporation respectfully move this Court for leave to file the accompanying brief as *amici curiae* supporting respondent in the above-entitled action, and submit that they satisfy the requirements respecting eligibility for such leave provided in Rule 42 of this Honorable Court on the grounds stated hereafter. The consent of respondent has been obtained. The consent of petitioner was requested but refused.

Nature of Movants' Interest.

Ellerman & Bucknall Steamship Company, Ltd. is a British corporation which owns a large fleet of ocean-going

cargo vessels which regularly call at United States ports. It is also the defendant in *Hagans v. Ellerman & Bucknall S. S. Co.* (D. C., E. D. Penna., 1961), 196 F. Supp. 593, which was argued on appeal before the Court of Appeals for the Third Circuit on October 4, 1962.

The *Hagans* litigation involves injuries sustained by a longshoreman working inside a pier. Hagans slipped on the pier floor on sand which had escaped from bags which the defendant shipowner had carried. Having been held liable in the District Court the shipowner appealed, contending, inter alia, that Hagans' cause of action did not constitute a maritime tort; that a finding of unseaworthiness could not be based upon deficiency of the cargo containers; and that the shipowner did not owe Hagans a duty to provide a safe place to work upon the pier which it neither owned, operated nor controlled.

On appeal, defendant cited the opinion of the Court of Appeals for the First Circuit in the instant case in support of its position. The Court of Appeals for the Third Circuit was also informed of the filing of the petition for a writ of certiorari herein. The Third Circuit has not as yet decided the *Hagans* appeal. Ellerman & Bucknall Steamship Company, Ltd. believes that the decision of this Court in the instant case may or will control the decision of the Third Circuit in the *Hagans* case.

Calmar Steamship Corporation is a domestic corporation which operates a fleet of cargo vessels in the United States inter-coastal trade. It is also the defendant in *Thompson v. Calmar Steamship Corporation* (Civil Action No. 26,450), now pending in the United States District Court for the Eastern District of Pennsylvania. The *Thompson* case involves injuries sustained on a pier by a longshoreman who fell from a moving railroad car containing cargo scheduled for loading aboard defendant's vessel. Defendant was held liable at the trial; post-trial motions have been filed by defendant and are awaiting de-

cision. Calmar Steamship Corporation believes that the decision in the instant case may or will control the decision in the *Thompson* case.

Apart from the specific litigation described above, movants have, generally, a deep and legitimate interest and concern in the outcome of the instant case. Both of them employ stevedoring contractors whose employees are regularly called upon to work on piers. The fundamental issues involving a vessel owner's liability to persons so situated, now presented to this Court for decision, are therefore most important in the daily operations of both movants. Also, to the extent that the question of a vessel owner's liability arising from defective cargo or cargo containers is here presented, future relationships between movants and those whose cargo they transport will be directly and materially affected.

Reasons for Submission of Brief.

Movants desire to support respondent. Petitioner's brief has been examined. Respondent's brief is not as yet available. However, counsel for movants have studied all available documents in the instant case, as well as the relevant authorities. On this basis, movants believe that certain important and relevant questions of law may not be fully covered in respondent's brief.

Movants believe that there is an important underlying jurisdictional question in this case. The parties have proceeded on the basis that this controversy is within the admiralty and maritime jurisdiction, and that consequently, the general maritime law applies. Existence of that jurisdiction was admitted in respondent's answer (R. 10). Nevertheless, movants believe it proper at any stage of a proceeding to invite the Court's attention to a possible lack of jurisdiction of the subject matter—particularly where, as here, the applicability of the principles under discussion depends upon the existence of that jurisdiction.

Movants therefore desire to discuss the jurisdictional question, so that its existence will at least be noted in the process of decision. Otherwise consideration of this fundamentally important issue may be aborted for lack of discussion from any source, resulting in a decision binding in future cases where jurisdiction would otherwise be controverted.

It is also believed that issues of wide importance relating to unseaworthiness based upon the condition of cargo, and a vessel owner's duty to provide longshoremen a safe place to work on a pier which it neither possessed nor controlled, nor had any right to do so, are involved in the instant case. Obviously a decision on these points will have an impact far beyond the confines of this case. Movants believe that these issues may not be fully presented in respondent's brief.

It has not been feasible to present this motion at an earlier date due to the necessity for studying all available documents and determining the position of counsel for the parties concerning this application.

For the foregoing reasons it is respectfully requested that leave be granted to file the accompanying brief as *amici curiae*.

Respectfully submitted,

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Counsel for Ellerman & Bucknall Steamship Company, Ltd. and Calmar Steamship Corporation.

BRIEF OF ELLERMAN & BUCKNALL STEAMSHIP COMPANY, LTD. AND CALMAR STEAMSHIP CORPORATION AS AMICI CURIAE.

The Interest of Ellerman & Bucknall Steamship Company, Ltd. and Calmar Steamship Corporation as Amici Curiae.

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Calmar Steamship Corporation is a domestic corporation which operates a fleet of cargo vessels in the United States inter-coastal trade. It is also the defendant in *Thompson v. Calmar Steamship Corporation* (Civil Action No. 26450), now pending in the United States District Court for the Eastern District of Pennsylvania. The *Thompson* case involves injuries sustained on a pier by a longshoreman who fell from a moving railroad car containing cargo scheduled for loading aboard defendant's vessel. Defendant was held liable at the trial; post-trial motions have been filed by defendant and are awaiting decision. Calmar Steamship Corporation believes that the decision in the instant case may or will control the decision in the *Thompson* case.

Apart from the specific litigation described above, movants have, generally, a deep and legitimate interest and concern in the outcome of the instant case. Both of them employ stevedoring contractors whose employees are regularly called upon to work on piers. The fundamental issues involving a vessel owner's liability to persons so situated, now presented to this Court for decision, are therefore most important in the daily operations of both movants. Also, to the extent that the question of a vessel owner's liability arising from defective cargo or cargo containers is here presented, future relationships between movants and those whose cargo they transport will be directly and materially affected.

ARGUMENT.

Summary of Argument.

This tort claim is not within the admiralty and maritime jurisdiction of the United States, either as historically defined by decisional law, or as extended by the Extension of Admiralty Jurisdiction Act, 46 U. S. C. Sec. 740.[1] Therefore principles of the general maritime law should not furnish the rules of decision or measure petitioner's right to recover. Accordingly, recovery should not be allowed on the ground of unseaworthiness or on the ground of respondent's failure to furnish petitioner a reasonably safe place to work. If the existence of admiralty jurisdiction were either directly or inferentially sustained here, the result would be to destroy the settled definition of the extent of that jurisdiction, and to invade the local law in a manner never intended by Congress.

Even if admiralty jurisdiction existed and the general maritime law were applicable, it affords no basis for petitioner's recovery on the ground of unseaworthiness. Insufficient or deficient packaging of cargo has never been held to render a vessel unseaworthy, or to constitute unseaworthiness in and of itself. A vessel owner does not warrant to longshoremen that it will furnish cargo which is safe to handle.

Nor was respondent under any obligation to furnish petitioner with a safe place to work on the pier. No authority supports the proposition that a party is responsible for the safety of premises in the absence of ownership or a right, whether exercised or not, to possession or control.

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1. Act of June 19, 1948, c. 526, 62 Stat. 496.

I.

This Controversy Is Not Within the Admiralty and Maritime Jurisdiction of the United States. The General Maritime Law Is Inapplicable.

The admiralty and maritime jurisdiction of this case is admitted in respondent's answer (R. 10). However, since jurisdiction can never be assumed nor conceded, and may be determinative in other situations on a different record, it is deemed necessary to make certain points.

Petitioner's right to recover is assertedly based upon principles of the general maritime law—i.e., breach of the warranty of seaworthiness, and respondent's failure to furnish petitioner a reasonably safe place to work. It is the existence of admiralty and maritime jurisdiction, and nothing else, which empowers the Federal Courts to create and apply the rules of decision collectively called the general maritime law. As this Court pointed out in *Romero v. International Terminal Operating Co.*, 358 U. S. 354, 360-361, Article III, Section 2, Clause 1, of the Constitution "empowered the Federal Courts in their exercise of the admiralty and maritime jurisdiction which had been conferred on them, to draw on the substantive law 'inherent in the admiralty and maritime jurisdiction', *Crowell v. Benson*, 285 U. S. 22, 55, and to continue the development of this law within Constitutional limits".

The present controversy is not within the admiralty and maritime jurisdiction. A decision impliedly upholding the existence of admiralty and maritime jurisdiction would raise serious questions which should be recognized beforehand.

Petitioner did not prove a maritime tort. His accident occurred on the pier. With respect to torts, it has been uniformly held that it is the locality, or situs, of the substance and consummation of the wrong which determines whether the matter is a maritime tort—i.e., one cognizable

under the admiralty and maritime jurisdiction. *Benedict on Admiralty*, Volume 1, p. 2.

The pier is an extension of the land; it is beyond the admiralty and maritime jurisdiction and local law applies to causes of action arising thereon. *Cleveland Terminal v. Cleveland S. S. Co.*, 208 U. S. 316; *Industrial Commission v. Nordenholt*, 259 U. S. 263; *Smith & Son v. Taylor*, 276 U. S. 179; *The Plymouth*, 3 Wall. 20, 33. It is therefore clear that petitioner's cause of action did not constitute a maritime tort. *Robinson on Admiralty*, p. 76; Gilmore and Black, *The Law of Admiralty*, p. 18; *Benedict on Admiralty*, Volume 1, p. 353.

The Extension of Admiralty Jurisdiction Act, 46 U. S. C. Sec. 740,[2] did not alter these principles in any relevant sense. This statute extended the admiralty and maritime jurisdiction of the United States to cases of injury to persons "*caused by a vessel* on navigable water, notwithstanding that such damage or injury be done or consummated on land." (Emphasis supplied.)

This statute did not change the basic concept of locality, or situs in fixing the boundaries of the admiralty and maritime jurisdiction in tort cases. It simply included within the jurisdictional locale injuries sustained ashore in instances where *a vessel* on navigable water is the responsible instrumentality. That the Extension Act does not bring this case within the admiralty and maritime jurisdiction is clear from its legislative history and under the decided cases.

By no stretch of reasoning was petitioner's injury caused by a vessel on navigable water. His injury was not caused by any vessel anywhere. Nor were the bags from which the beans escaped appliances or appurtenances of any vessel. The vessel's only connection with the bags was that she had previously transported them as a common carrier by water. They were no more a part of the vessel than are passengers part of a passenger train.

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2. Act of June 19, 1948, c. 526, 62 Stat. 496.

The legislative history of the Extension Act makes it plain that it does not apply to the present case. See Senate Report No. 1593 in Volume 1, U. S. Code Congressional Service (80th Congress, 2nd Session, 1948), p. 1898. The Report makes it clear that the extension of jurisdiction intended by Congress pertained solely to damage to a person or structure ashore *caused by a vessel* in navigable water. Indeed, the main thrust of the statute was to afford a remedy in admiralty to owners of shore structures which had been struck by a vessel.

The decided cases hold that the Extension Act is to be construed as written. In *Clinton v. Joshua Hendy Corporation* (C. A. 9, 1960), 285 F. 2d 199, the complaint alleged that defendant's Chief Mate sent a libelous letter to plaintiff-seaman's union. The letter was written and published on the ship to agents of plaintiff's union. Plaintiff was expelled from his union and brought suit for tortious interference with his contractual relations. The court held that jurisdiction could not be sustained under the Admiralty Extension Act, saying:

> ". . . The vessel itself, in the case at bar, was not involved in the alleged tort; it was only a fortuitous circumstance that the allegedly libelous letter was written on the decks of the ship rather than in appellee's on-shore offices." (at p. 201)

The court further held that the language of the statute and the relevant legislative history was convincing that:

> ". . . Congress did not intend to extend admiralty jurisdiction to a case such as this one. The committee reports and accompanying letters are concerned largely with damage to land structures caused by ships on navigable waters. In our view, the statute should not be construed to confer admiralty jurisdiction over on-shore injuries *unless the vessel itself or some accessory of it* is directly involved . . .". (at pp. 201-202; emphasis in original)

In *Kent v. Shell Oil Company* (C. A. 5, 1961), 286 F. 2d 746, a truck driver unloading pipe into a barge by means of "skids" was injured when struck by a piece of the pipe. The District Court refused to charge on unseaworthiness. The Court of Appeals held that the refusal was proper, saying:

> ". . . But the cause of the injury in no sense could be attributed to the vessel or its appurtenances, even if it is assumed that skids were part of the barge's equipment through judicial adoption . . . This means that the 'injuries' were non-maritime in nature. The extension of admiralty jurisdiction statute, 46 U. S. C. A. Sec. 740, does not therefore make a classic non-maritime, land-based injury into something else." (at p. 750)

In *Salmond v. Isbrandtsen Co., Inc.*, 144 N. Y. S. (2nd) 578, 1955 A. M. C. 2334, chunks of concrete ballast were being removed from a vessel by a contractor. A cracked chunk broke while suspended in mid-air, injuring a workman ashore. It was held that the case was not governed by the maritime law because the injury was not "caused by a vessel".

Thus it is clear that even under the Extension Act, an injury to a person ashore does not constitute a maritime tort unless the injury is inflicted by a vessel, or her equipment or appliances. Consistent with this principle, and clearly distinguishable from the present case, are the decisions relied on by petitioner such as *Strika v. Netherlands Ministry of Traffic* (C. A. 2, 1950), 185 F. 2d 555, and *Hagans v. Farrell Lines, Inc.* (C. A. 3, 1956), 237 F. 2d 477. In both of these cases a person ashore was injured by the vessel's malfunctioning appliances.

Certainly it does not strain logic to say that a "vessel" includes her equipment and appliances; nor is a jurisdictional test based on that definition difficult to apply. The Extension Act, thus construed so as to confine the Con-

gressionally conferred jurisdiction, would raise no serious Constitutional questions. It is when the definition is distorted in an effort to bring something never intended by Congress within the Extension Act that serious questions arise. That is what petitioner attempts to do here. He suggests, in effect, that he can recover on principles of the general maritime law because of his "status"—i.e., because he is a longshoreman engaged in cargo discharge. In petitioner's view, "status" would presumably supplant locality, or situs, as the test of admiralty jurisdiction in tort cases.

If it were held that this case is within the admiralty and martime jurisdiction, the end result would be the destruction of jurisdictional lines clearly laid down by this Court in decisions stretching over more than a century and never heretofore seriously questioned. The lines this Court had thus drawn were certainly understood by Congress when it passed the Extension Act. Any new definition now would be in derogation of the clear intendment of that statute.

The jurisdictional complications inherent in petitioner's position can be readily illustrated in terms of his theories of recovery. Petitioner asserts liability on two grounds: negligence and unseaworthiness. The negligence claim is based on fault of the vessel's officers in permitting the cargo to be discharged and/or in failing to provide petitioner with a safe place to work on the pier.

Implicit in petitioner's argument is the proposition that where negligence of a vessel's officers results in injury to persons ashore, admiralty jurisdiction exists under the Extension Act. If this is so, what are the physical boundaries of that jurisdiction? Let us suppose that a vessel's officer is dispatched ashore with an automobile on ship's business and negligently injures a pedestrian. Would petitioner suggest that the injured could bring suit in admiralty and recover under principles of the maritime law—or would he restrict the existence of admiralty jurisdiction to in-

stances where the victim happened to be a "longshoreman"?

Clearly, any distinction based upon the identity of the victim is untenable. The Extension Act does not create any preferred class of beneficiaries. It is a jurisdictional statute of general application.

It is not suggested that persons injured under the above-described circumstances have no remedy. However, discussion of the local law is presently beside the point. The point is that Congress did not intend an extension of the admiralty jurisdiction to cases such as this. Once it is assumed that admiralty jurisdiction exists where a person is injured ashore by the negligence of ship's personnel, the limits of the jurisdiction become practically indefinable.

Nor can recovery on the ground of unseaworthiness be supported from a jurisdictional standpoint. Petitioner speaks interchangeably of unseaworthiness of the ship, unseaworthy cargo, and, more vaguely, an "unseaworthy condition".

Regardless of terminology, the fact remains that viewing the situation most favorably to petitioner, his injury resulted from leakage of the contents from bags of cargo which had been the subject of common carriage by water by respondent. Even if unseaworthiness were postulated, it does not breed admiralty jurisdiction here. If it did it would follow that this cargo could roam about anywhere, spilling out admiralty jurisdiction along with the beans wherever harm ensues—even, as the Court of Appeals observed, on a warehouse floor in Denver.

No attempt will be made to refine further the jurisdictional propositions inherent in petitioner's position. From what has been said, it is obvious that an assertion of admiralty jurisdiction in this case will not withstand analysis. The novel consequences flowing from assertion of admiralty jurisdiction here point more strongly toward the conclusion that the Extension Act should be construed as written. When a vessel, her appliances or equipment causes injuries

ashore, the controversy is within the admiralty jurisdiction. Otherwise, it is not.

For these reasons, petitioner's injury did not constitute a maritime tort and his right to recover should not be measured by the substantive principles of the general maritime law.

II.

Unseaworthiness Cannot Be Predicated Upon the Condition of the Cargo.

Petitioner's argument based on unseaworthiness is elusive. In different contexts, petitioner speaks of unseaworthiness of the ship, unseaworthiness of the cargo, and, more loosely, an undefined "unseaworthy condition". Certainly no clear analysis can be made of the problem for decision unless terms are defined, and the entity under discussion is plainly identified.

Unseaworthiness of the ship, as a ground for liability, does not exist here. The classic definition of unseaworthiness is insufficiency of the vessel, her equipment or appliances. As this Court pointed out in *West v. United States*, 361 U. S. 118, in cases where recovery by shoreside workers has been sustained, "The workmen, like the seamen, depended upon the fitness of the ships, their equipment, and gear. They were obliged to work with whatever the ship owner supplied and it was only fair for the latter to be subjected to the absolute warranty that the ships were seaworthy . . ." (at 361 U. S. 121). See also *Brabazon v. Belships Co.* (C. A. 3, 1953), 202 F. 2d 904, 908.

In *Kent v. Shell Oil Company* (C. A. 5, 1961), 286 F. 2d 746, the Court, denying the applicability of the seaworthiness doctrine, said:

> ". . . But the cause of the injury in no sense could be attributed to the vessel or its appurtenances, even

> if it is assumed that the skids were part of the barge's equipment through judicial adoption . . .". (at 286 F. 2d 750)
>
> The court further pointed out that
>
> ". . . where the injuries are sustained wholly ashore and are caused by a thing not a part of the vessel or its appurtenances, the failure or deficiency of such facility is not deemed either to constitute unseaworthiness or give rise to any recovery under the doctrine of seaworthiness. Fredericks v. American Export Lines, 2 Cir., 1955, 227 F. 2d 459, 454, 1956 A.M. C. 57." (at p. 752)

It is true that the historical concept of unseaworthiness has been judicially broadened to include unseaworthiness of *a vessel* resulting from improper stowage of cargo. Where cargo is stowed improperly aboard the vessel, that can render the vessel itself unseaworthy as to a longshoreman injured by reason of the improper stowage. *Gindville v. American-Hawaiian Steamship Co.* (C. A. 3, 1955), 224 F. 2d 746; *Palazzolo v. Pan-Atlantic S. S. Corp.* (C. A. 2, 1954), 211 F. 2d 277; *Curtis v. A. Garcia y Cia.* (C. A. 3, 1957), 241 F. 2d 30, 34; *Rich v. Ellerman & Bucknall S. S. Co.* (C. A. 2, 1960), 278 F. 2d 704.

Here it is contended that unseaworthiness arises from the condition of the cargo itself. This is a totally different proposition. Unseaworthiness of a vessel stemming from improper stowage of cargo has nothing to do with the integrity of cargo containers.

Cargo which has been the subject of common carriage by water is not impressed with any separate warranty of seaworthiness. Or, to put it differently, a vessel does not warrant to a longshoreman that the cargo is safe to handle.

In *Carabellese v. Naviera Aznar, S. A.* (C. A. 2, 1960), 285 F. 2d 355, cert. den. 365 U. S. 872, a longshoreman working aboard a vessel was injured when a large crate being loaded toppled and fell on him. He asserted as error the court's refusal to charge "that the top heaviness or

instability of the case of cargo on the vessel would in itself be sufficient to prompt unseaworthiness" (at p. 359).

After discussing various types of unseaworthiness, the court noted that in each of them

> ". . . the defect that caused the injury related either to the vessel itself or to 'the proper appliance appurtenant to the ship,' The Osceola, 1903, 189 U. S. 158, 175, 23 S. Ct. 483, 487, 47 L. Ed. 760, whereas here the alleged defect was in a piece of cargo . . ." (at p. 359)

The court pointed out the distinction between stowage of the cargo and the condition of the cargo itself and concluded that although there may have been a valid claim of unseaworthiness had the crate been improperly stowed and had fallen on the plaintiff as he undertook some later operation, nevertheless

> ". . . we know of no case that has imposed absolute liability on the owner where the alleged danger was inherent in the cargo and this was still in the course of being loaded. Hence the question posed is whether the owner warrants to longshoremen not simply a safe place in which to handle cargo but cargo which is safe to handle.
>
> "We are not disposed so to extend the doctrine, at least on the facts here. Almost any cargo presents some hazard in handling . . .". (at pp. 359-360)

In *Freeman v. A. H. Bull S. S. Co.* (C. A. 5, 1942), 125 F. 2d 774, recovery was denied for the death of a longshoreman resulting from noxious gases emanating from the cargo. In that case the injury and death actually occurred aboard the vessel. The court said "The fault here was not with the vessel, but in the cargo" (at p. 775).

In *McMahan v. The Panamolga,* 127 F. Supp. 659, 670, the court stated that it had been referred to no case, nor

could it find any "which extends the warranty of seaworthiness to the condition or ingredients of cargo being loaded onto the ship by stevedore's employees". The court then held that there was no such warranty.

In *Cornec v. Baltimore & Ohio R. Co.* (C. A. 4, 1931), 48 F. 2d 497, cert. den. 284 U. S. 621, a case frequently cited and relied upon in recent years by this Court (cf. *Weyerhaeuser S. S. Co. v. Nacirema Operating Co., Inc.*, 355 U. S. 563), there was an explosion aboard ship resulting from ignition of dust from a cargo of pitch. The case would not have been decided the way it was if there had been any warranty by the shipowner with respect to the cargo.

Therefore, even if the general maritime law were applicable, unseaworthiness liability based on the condition of the cargo containers should not be recognized here.

III.

Respondent Cannot Be Held Liable for Negligence in Failing to Provide Petitioner With a Safe Place to Work.

Petitioner's argument based on negligence includes the contention that respondent owed petitioner the duty to provide a safe place to work. Petitioner asserts that respondent's duty is unaffected by the fact that respondent neither controlled, nor had the right to control the locus of injury.

Petitioner has not cited and cannot cite any case for the proposition that a shipowner owes a duty to provide a longshoreman with a safe place to work on a pier which the shipowner neither owned, possessed nor controlled. Contrary to petitioner's assertion, liability for failure to provide a safe place does stem from possession and control of the premises. Even as to shipboard injuries, lack of control of the vessel insulates the vessel owner from this species of liability.

In *West v. United States*, 361 U. S. 118, this Court denied recovery to a shoreside worker assisting in pre-

paring a vessel for return to active service. Holding that the vessel owner could not be liable for failure to furnish a safe place to work, this Court said:

> "Petitioner overlooks that here the respondent had no control over the vessels, or power either to supervise or to control the repair work in which petitioner was engaged . . . It appears manifestly unfair to apply the requirement of a safe place to work to the shipowner when he has no control over the ship or the repairs, and the work of repair in effect creates the dangor which makes the place unsafe . . .". (at p. 123)

The Third Circuit has also held that control is a necessary ingredient of the liability. In *Brabazon v. Belships Co.* (C. A. 3, 1953), 202 F. 2d 904, disposing of the vessel owner's defense that the hazard arose during the longshoreman's operations, it was said:

> ". . . The owner who retains control of the vessel as a whole and general supervision of what is being accomplished by an independent contractor in one part of the vessel is not relieved of all responsibility in connection with the prevention, discovery or correction of new hazards which may make the area temporarily used and occupied by independent contractors an unsafe place to work . . .". (at p. 906)

Marceau v. Great Lakes Transit Corporation (C. A. 2, 1945), 146 F. 2d 416, relied on by petitioner, actually supports the view that control of the premises is necessary to support a duty to provide a safe place to work. In *Marceau*, the injured plaintiff was a crew member employed by the defendant, so that liability stemmed in the first instance from the Jones Act.[3] More importantly, the defendant in *Marceau* was the lessee in possession of the pier. In upholding liability, the Court said:

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3. Act of June 5, 1920, c. 250, Sec. 33, 41 Stat. 1007, 46 U. S. C. Sec. 688.

". . . Consequently at the time of the accident he was not only acting in the course of his employment but suffered his injuries while on property *in the possession and under the control* of the defendant as lessee . . ." (at 146 F. 2d 418; emphasis supplied)

Nor does *Imperial Oil Limited v. Drlik* (C. A. 6, 1956), 234 F. 2d 4, support petitioner's contention. The defendant's liability for negligence was not disputed in *Drlik*; the only point decided was the availability of the defenses of assumption of risk and contributory negligence (at 234 F. 2d 9).

Hagans v. Ellerman & Bucknall S. S. Co., 196 F. Supp. 593, does not attempt to analyze the correctness of imposing liability for failure to provide a safe place to work upon a party who had neither possession nor control of the premises. It would appear from petitioner's quotation (Brief, p. 23) that in *Hagans*, the defendant admitted the existence of the duty. While this was not so (a point urged on appeal before the Third Circuit), the point is that the liability was assumed to exist, rather than decided, in *Hagans*.

In summary, no decided case supports petitioner's contention that control of the premises is irrelevant for purposes of imposing liability upon a shipowner for failure to provide a longshoreman with a safe place to work on the pier. The controlling authorities cited above look in the opposite direction, consistently with fundamental principles of tort law.

CONCLUSION.

Each of the points discussed in this brief is directly involved in the present decision, and merits the serious consideration of this Court. Acceptance of petitioner's contentions would result in a new and different test for the existence of admiralty jurisdiction and, consequently, the applicability of the general maritime law; the creation

of a new species of unseaworthiness liability; and the imposition of a novel type of negligence liability against one who had neither ownership, nor even the right to possession or control of the premises. The decision below should be affirmed.

Respectfully submitted,

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Counsel for Ellerman & Bucknall Steamship Company, Ltd. and Calmar Steamship Corporation, Amici Curiae.